IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2810 OF 2007

1. Bhagirath Shankar Somani,)
Age: 80 Yrs., Residing at 3/56,)
M.I.G. Colony, Chittaranjan Nagar,)
Rajwadi, Ghatkopar (East),)
Bombay-77.)

2. Smt.Kamlabai Bhagirath Somani,)
Residing at 3/56, M.I.G. Colony,)
Chittaranjan Nagar, Rajwadi,)
Ghatkopar (East), Bombay-77.)-Petitioners

Versus

1. Rameshchandra Daulal Soni,)
Residing at Sankli, Naoroji Lane,)
Ghatkopar (West), Mumbai-86.)

2. Onkar Builders, a Firm,)
Carrying on business at 1st Floor,)
Johari Mansion, 259, Kalbadevi Road,)
Bombay-2.)-Respondents

WITH
WRIT PETITION NO.2823 OF 2007

1. Bhagirath Shankar Somani,)
Age: 80 Yrs., Residing at 3/56,)
M.I.G. Colony, Chittaranjan Nagar,)
Rajwadi, Ghatkopar (East),)
Bombay-77.) -Petitioner

Versus

1. Rameshchandra Daulal Soni,)
Residing at Sankli, Naoroji Lane,)
Ghatkopar (West), Mumbai-86.)

2. Onkar Builders, a Firm,)
Carrying on business at 1st Floor,)
Johari Mansion, 259, Kalbadevi Road,)
Bombay-2.)-Respondents

Shri Suresh Gole for the Petitioners in both the Petitions.

Shri Rajesh Shah alongwith Sujay Gawade for the

Respondents in both the Petitions.

CORAM : ABHAY S. OKA, J.

DATE ON WHICH SUBMISSIONS WERE HEARD : MAY 03, 2007.

DATE ON WHICH JUDGMENT IS PRONOUNCED : JUNE 04, 2007.

JUDGMENT:

1. Considering the controversy involved in these Petitions, by consent of the Advocates appearing for the parties, the same were taken up for final disposal at admission stage. On 03rd May, 2007 I have heard the submissions of Shri Suresh Gole appearing for the Petitioners and Shri Rajesh Shah appearing for the first Respondent.

2. The Petitioners in the Writ Petition No.2810 of 2007 are the original first and second Defendants in S.C.Suit No.4138 of 1978 filed by the first Respondent herein. The second Respondent is the original third Defendant in the said suit. The Petitioner in Writ Petition No.2823 of 2007 is the original first Defendant in S.C.Suit No.4137 of 1978 filed by the first Respondent. The second Respondent is the second Defendant in the said suit. Considering the controversy involved in these Petitions, it is not necessary to serve notice of these Petitions to the

second Respondent in both the Petitions.

3. As stated earlier there are two suits filed by the first Respondent. The first suit (S.C.Suit No.4138 of 1978) relates to shed No.44 in Onkar Industrial Estate, Shri Hanuman Silk Mill Compound, Kanjur Marg, Mumbai 78. The second suit (S.C.Suit No.4137 of 1978) relates to shed No.23, 12A in the same Onkar Industrial Estate. The contention raised by the first Respondent in both the suits is that the sheds subject matter of the suits were acquired on ownership basis by the first Respondent from the second Respondent. The first Petitioner in Writ Petition No.2810 of 2007 is the husband of the second Petitioner. The suits were filed by the first Respondent for declaration that the Petitioners are the trespassers in respect of said two sheds. A decree for possession was also prayed for in the said suits.

4. The written statements were filed in both the suits by the Petitioners. The contention in short in the written statements is that in respect of both the sheds the first Respondent-Plaintiff is merely a benamidar. It is contended that the second Petitioner in Writ Petition No.2810 of 2007 is the real purchaser

of the shed No.23. It is contended that the first Petitioner in Writ Petition No.2810 of 2007 is the real purchaser of the shed No.44. It is stated that the father of the first Respondent who was holding the post of the Additional Chief Metropolitan Magistrate had advanced loan to the Petitioners in Writ Petition No.2810 of 2007 and for the sake of convenience the sheds were acquired in the name of the first Respondent. It is stated that the entire consideration for acquiring the said sheds was paid by the Petitioners.

5. Issues were framed by the learned trial Judge in both the suits on 08th August, 1978. When the suit were fixed for recording of evidence, on the oral prayer made by the first Respondent, the learned trial Judge framed an additional issue casting the burden on the Petitioners to prove their case of benami transaction and further directed the Petitioners to lead the evidence first as according to the learned trial Judge the case was covered by Rule 1 of Order XVIII of the Code of Civil Procedure, 1908. The identical orders passed in the said suits were challenged by the Petitioners by filing Writ Petition Nos.5757 of 2006 and 5799 of 2006. By Judgment and Order dated 01st December, 2006 both the Petitions

were allowed and the orders were set aside only on the ground that the orders were passed in breach of principles of natural justice. However, liberty was reserved by this Court in favour of the first Respondent to take out appropriate Application for framing of additional issue and for a direction against the Petitioners to enter the witness box before the first Respondent leads the evidence.

6. On the basis of the liberty granted by this Court, the first Respondent took out Notices of Motion No.36 of 2007 and 37 of 2007 in the said two suits. The prayers in the Notices of Motion were identical. The first prayer was for framing an additional issue No.3A and the second one was for seeking direction against the Petitioners to first lead the evidence on the basis of settled legal principle that one who asserts has to prove his case. By a common Judgment and Order dated 14th March, 2007, the learned trial Judge disposed of both the Notices of Motion by making the Notices of Motion absolute in terms of prayer clauses (a) and (b) thereof. Thus, an additional issue was framed for casting the burden on the Petitioners for proving their case that the first Respondent was the benami owner of the sheds in question. The learned Judge directed the Petitioners

to lead their evidence first.

7. The submission of the learned counsel for the Petitioners is that the additional issue No.3A framed under the impugned order does not arise out of the pleadings. He submitted that there was no power vesting in the trial Court to give a direction to the Petitioners to lead the evidence before the evidence was led by the first Respondent. He submitted that initial burden of establishing the ownership of the sheds was certainly on the first Respondent and therefore, there was no occasion for issuing a direction that the Petitioners have to lead evidence before the first Respondent-Plaintiff leads evidence.

8. The learned counsel appearing for the first Respondent supported the impugned Judgment and Order. He submitted that once a case made out by the Petitioners of benami transaction is not established, the decree for possession must follow in both the suits. He submitted that therefore the learned Judge was justified in issuing a direction to the Petitioners to lead the evidence. He placed reliance on decision of the learned single Judge of this Court in the case of **Kumudini Damodar Magar and Ors. Vs. Bhushan Damodar Magar & Ors (AIR 2004 Bombay Page 397)**

and submitted that the Court possesses a power to issue direction to the Defendant to lead evidence first wherever the case is covered by Rule 1 of Order XVIII of the said Code. In so far as burden of proof is concerned, he placed reliance on decision of the Apex Court in the case of **Pawan Kumar Gupta V. Rochiram Nagdeo (AIR 1999 Supreme Court Page 1823)**. He also placed reliance on a decision of the Gujarat High Court in the case of **M/s Keshavlal Durlabhasinghbhai's Firm & Anr. Vs. Shri Jalaram Pulse Mills (AIR 1995 Gujarat Page 166)**. He also placed reliance on decision of Madhya Pradesh High Court in the case of **Smt Jagran & Ors. Vs. Smt Basanti Bai & Ors. (2001 AIHC Page 1030)**.

9. I have carefully considered the submissions. The first part of the impugned order is as regards framing additional issue No.3A. The said issue is identical in both the suits. Additional issue No.3A in S.C. Suit No.4138 of 1978 reads thus:

> "Whether Defendant No.2 proves that the Plaintiff is benami owner of the suit premises as alleged in the written statement?"

Perusal of the plaint shows that the suit of the first Respondent is founded on title which he claims to have acquired from the second Respondent. In paragraph No.2 of the written statement filed by the Petitioners in S.C.Suit No.4138 of 1978 a specific stand has been taken which reads thus:

> "These Defendants further state that the said unit was purchased by the Defendant No.2 in the name of the Plaintiff as a benamidar only because these Defendants were given the loan amounting to Rs.49,654/- by the father of the Plaintiff Shri Daulal J. Soni who was holding the post of Additional Chief Metropolitan Magistrate formerly and had retired from that post in the year 1971. For reasons best known to the said Shri Daulal J. Soni, he advanced the loan amount to these Defendants in the name of the Plaintiff, who is related to him as his son and who was in the year 1973 a college student studying in the Commerce College with age about 20 years. Neither the Plaintiff nor his father had any knowledge of the trade of Mechanical Engineering. The only intention of the Plaintiff’s father was

> to invest his moneys for gain of interest without possessing any money lending licence".

Thus, a contention has been raised that the first Respondent is a mere benamidar and the real purchaser of the suit shed in the said suit is the Petitioner No.2. It is thus obvious that additional issue as framed by the impugned order certainly arises as the case of the Petitioners in the said suit is that though the suit shed is purchased in name of the first Respondent it is the second Petitioner who is the real owner of the suit shed who has paid the consideration. In any event in a Petition under Article 227 of the Constitution of India it is very difficult to find fault with an order framing an additional issue.

10. In so far as second part of the impugned order is concerned, it will be necessary to refer to Rule 1 of Order XVIII of the said Code which reads as under:

> "1. Right to begin.- The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the

> defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin".

11. It will be also necessary to refer to Rule 3 of Order XVIII which reads thus:

> "3. Evidence where several issues.- Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case".

12. Rule 1 recognises that ordinarily it is the Plaintiff who has a right to begin by leading his

evidence. The only exception is where the Defendant admits the facts alleged by the Plaintiff and contends that either on point of law or on some additional facts alleged by the Defendant that the Plaintiff is not entitled to any part of the relief which he seeks. In such a case, the Defendant has right to begin. Rule 3, deals with a contingency where burden of proving some of the issues is on the Defendant. In such a case Rule 3 gives an option to the Plaintiff to produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party. When the Plaintiff exercises such option, he can produce the evidence on said issues by way of rebuttal after the Defendant has produced all his evidence.

13. The first issue to be decided is whether by placing reliance on Rule 1 of Order XVIII of the said Code, the Court can give direction to the Defendant to enter the witness box before the Plaintiff leads his evidence. The said issue is no longer res integra. The learned single Judge of this Court in the case of **Haran Bidi Suppliers & Anr. Vs. M/s.V.M and Company, Bhandara 2001(4) Mharashtra Law Journal Page 113]** had occasion to deal with the said issue. This Court was dealing with a revision Application where the

challenge was to an order by which the trial Court had directed the Defendants to enter the witness box before the Plaintiff leads the evidence. This Court considered the provisions of Order XVIII of the said Code and in particular Rule 1 thereof. After considering Rule 1, the learned single Judge held thus:

> "On the plain language of the said provisions, it would appear that it is only an enabling provision entitling the defendant of right to begin. **In my view, this provision cannot be interpreted to mean that the Court would be competent to direct the defendant to enter the witness-box before the plaintiff and lead evidence in support of its case**. In the circumstances, the impugned order passed by the trial Court cannot be sustained in law". (Emphasis added)

There is one more decision of another learned single Judge on this aspect. The said decision is rendered in the case of **Gouri Food Products, Nagpur Vs. Priya Trading Company, Nagpur [2002(4) Maharashtra Law Journal page 880]**. The same issue arose before this

Court regarding power of the trial Court to give direction to the Defendant to lead evidence before the Plaintiff leads his evidence. This Court considered the provisions of Order XVIII and in particular Rules 1 to 3 thereof. This Court also considered the decision of the Gujarat High Court in the case of M/s Keshavlal Durlabhasinbhai's Firm (supra) on which reliance has been placed by the learned counsel for the first Respondent. In paragraph No.7, the learned single Judge held thus:

> "The plain reading of Rule 1 would show that the plaintiff, undoubtedly, has a right to adduce evidence first in the suit. **However, in view of certain contingencies mentioned in Rule 1, the defendant gets right to begin, and is entitled to adduce evidence first in the suit. This is, undoubtedly, an enabling provision entitling the defendant of right to begin. However, nothing in this provision confers any power on the Court under this Rule to direct defendant to adduced evidence first in the suit if the defendant himself has not claimed such right in view of the contingencies mentioned in Rule 1".**(Emphasis added)

In paragraph No.11 of the said decision, this Court referred to the decision of this Court in the case of Haran Bidi Suppliers (supra). The learned single Judge held in paragraph No.11 as under:

> "11. On the backdrop of the above referred legal position, vis-a-vis Order XVIII, Rule 1 of the Civil Procedure Code, **it is evidence that it only confers a right, in the contingencies referred to hereinabove, to begin, which is apparently an enabling provision entitling the defendant of right to begin, and does not confer any power on the court to direct the defendant to enter witness box and adduce evidence first in support of his claim before the plaintiff enters witness box**. The contention advanced by the learned counsel for the applicant in this regard cannot be accepted". (Emphasis added)

In paragraph No.12 this Court held thus:

> "It, no doubt, sounds little harsh, however, in absence of a specific provision under

> Order XVIII and its Sub-rules, it will not be proper to presume the existence of such power in the court. Such interpretation of Order XVIII of the Code of Civil Procedure may not be valid".

14. Reliance was placed by the learned counsel appearing for the first Respondent on the decision of this Court in the case of Kumudini Damodar Magar (supra). It must be borne in mind that the issue which is involved in these Petitions, viz, "Whether the Court has power to issue directions under Rule 1 of Order XVIII of the said Code to the Defendant to lead his evidence before the Plaintiff leads evidence?" did not arise in the said case. This Court was concerned with the issue whether a Defendant can be permitted to lead evidence prior to the recording of evidence of the Plaintiff. The right which was claimed by the Defendant in the said case was on the basis of Rule 3A of Order XVIII. In paragraph No.13 this Court held thus:

> "Thus, if the plaintiff wants to examine defendant as a witness on his behalf, he cannot be precluded from examining him on the ground that the said defendant has

> neither appeared in the suit nor upon appearance filed written statement nor on the ground that the prayer of the defendant for filing written statement had been rejected. In terms of the provision of Rule 1 of Order XVIII, the right or privilege to begin first and, thus, to examine the witness first depends on the pleadings of the parties. While ordinarily it is the plaintiff who begins first, in an appropriate case the defendant may claim such privilege or may be directed by the Court to do so bearing in mind the facts and circumstances of the case".

15. Apart from the fact that the issue which is involved in this Petition regarding the power of the Court to issue direction did not arise for consideration before the learned single Judge, the aforesaid two decisions of the learned single Judges of this Court in the case of Haran Bidi Suppliers and Gouri Food Products (supra) which were binding precedents were not brought to the notice of the learned single Judge. As the issue involved in this Petition never arose for consideration before the learned single Judge in the case of Kumudini Damodar

Magar (supra), the observations made in paragraph No.13 which are referred to above cannot be read as a binding ratio or a binding precedent.

16. Thus, the consistent view taken by this Court is that a direction against the Defendant to lead evidence before the Plaintiff leads his evidence cannot be issued under sub rule 1 of Order XVIII of the said Code. The scheme of Rule 1 appears to be that as a normal Rule it is the privilege of the Plaintiff to lead his evidence first. However, it enables the Defendant to exercise the right in the contingency mentioned in the Rule. The Plaintiff in a given case can make a statement before the trial Court stating that as the case is covered by exception in Rule 1 of Order XVIII of the said Code, he is reserving his right to lead evidence in rebuttal after the Defendant leads his evidence. The said option can be exercised in mofussil courts by the Plaintiff by filing a pursis to that effect. In a Court in which there is no practice of filing pursis, the Plaintiff can make oral statement to that effect which will be normally recorded in the roznama of the case. After the Plaintiff exercises option it is for the Defendant to decide whether he wants to lead the evidence. If the Defendant decides to lead the evidence, the

Plaintiff can always lead evidence in rebuttal. As held by this Court, the Court has no power to issue a direction to the Defendant compelling him to lead his evidence before the Plaintiff adduces his evidence. Only when the Defendant claims right to begin under Rule 1 and the Plaintiff disputes existence of such a right, the Court will have to decide the question whether the Defendant has acquired a right to begin.

17. In view of the settled position of law as reflected from the aforesaid decisions, the learned trial Judge could not have granted prayer clause (b) of the Notices of Motion. Therefore, the impugned order in so far as it grants prayer clause (b) will have to be quashed and set aside.

18. While setting aside the relief granted in terms of prayer clause (b), it is obvious that the first Respondent can always exercise the option in terms of Rule 1 of Order XVIII by reserving his right to lead evidence in rebuttal. The learned Judge will have to give liberty to the first Respondent to exercise his option. After the first Respondent exercises his option, it will be for the Petitioners to decide whether they want to lead evidence. After the parties lead evidence, it will be for the trial

Court to decide all the issues in the light of the evidence adduced by the parties.

19. Hence, I pass the following order:

(i) The impugned Judgment and Order in so far as it makes Notices of Motion No.36 of 2007 and 37 of 2007 absolute in terms of prayer clause (a) thereof is hereby confirmed. However, that part of the impugned order by which prayer clause (b) in both the Notices of Motion is granted is quashed and set aside subject to observations made in this Judgment.

(ii) Considering the facts that the original suit is of the year 1978, the trial Court shall dispose of the suits as expeditiously as possible and preferably on or before 31st December, 2007.

(iii) All contentions of the parties in the pending suit are expressly kept open.

JUDGE